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TANG HAK JU

v.

KETUA MENTERI NEGERI PULAU PINANG & ORS

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COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
ABDUL WAHAB PATAIL J
[CIVIL APPEAL NO: P-01-38-2009]
20 JULY 2009

C

CIVIL PROCEDURE: *Government proceedings - Satisfaction of orders against the Government - Certificate under s. 33 Government Proceedings Act 1956 - Whether certificate imposes upon government a statutory duty to pay the judgment sum certified in the certificate - Whether such certificate may be issued even when appeal is pending - Whether court may give effect to such statutory duty to pay through coercive force of mandamus against government*

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CIVIL PROCEDURE: *Prerogative writs/orders - Mandamus - Satisfaction of orders against the Government - Certificate under s. 33 Government Proceedings Act 1956 - Whether certificate imposes a statutory duty to pay the judgment sum certified in the certificate - Whether court may give effect to such statutory duty to pay through coercive force of mandamus against government*

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The appellant (the plaintiff in a civil suit against several State Government Officers) obtained judgment against certain officers (the defendants in the civil suit) of the Penang State Government ('State Government'). Damages were assessed by the Deputy Registrar. The defendants appealed to the judge in chambers but the appeal was adjourned several times at the defendants' request. The defendants' application for a stay of execution pending the appeal was dismissed with costs. The defendants exhausted all appeal avenues against the judgment on liability. The appellant repeatedly requested the State Government to effect payment of the judgment sum but failed to get any positive response. The appellant then obtained a certificate pursuant to s. 33 of the Government Proceedings Act 1956 ('GPA') directing the defendants to pay half the assessed damages with interest pending their appeal to the judge in chambers. Copies of the certificate were served on the State Legal Adviser and upon the respondents herein. The respondents failed and/or refused to set aside the

certificate. The appellant thereafter applied to the High Court for an order of mandamus directing the respondents to comply with the certificate. The judge dismissed the application but instead ordered the respondents to pay into court the amount stated in the certificate pending the defendants' appeal to the judge in chambers concerning the assessed damages. The judge *inter alia* held that the certificate under s. 33 had been issued prematurely. The appellant thus appealed to the Court of Appeal.

Held (allowing the appeal)

Per KN Segara JCA delivering the judgment of the court:

- (1) The trial judge failed to appreciate that there was no valid stay of the execution on the assessment of damages and that the s. 33 certificate had never been set aside. It was not open to the trial judge to rule that the certificate was obtained prematurely and that it ought to be applied for only after the appeal against assessment of damages had been finally disposed off. The learned judge had misdirected himself in law and in fact that the s. 33 certificate had been issued prematurely. (para 15)
- (2) Section 33 of the GPA uses clear and unambiguous language. A certificate under s. 33 can be issued even when an appeal is still pending subject to the discretion of the court to direct that the payment of the whole or part of the judgment sum be suspended pending the appeal. In the instant case the Deputy Registrar had exercised that discretion by suspending payment of half of the judgment sum pending the appeal to the judge in chambers. (para 16)
- (3) Section 33(2) and (3) of the GPA provides that upon service of the certificate the Government shall pay to the person entitled or to his solicitors the amount appearing by the certificate to be due to him together with the interest lawfully due. This statutory duty is subject only to the proviso under s. 33(3) which empowers the court issuing the certificate to suspend the whole or part of payment pending the appeal. There is no provision exempting the Government from payment to the person entitled when there is an appeal or providing for payment into court instead. It would appear that under s. 33(4) GPA the Government is excluded from the ordinary enforcement procedure but on the other hand by

- A s. 33(3) GPA the Government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s. 33(3) is clearly a statutory duty which is binding on the State Government. There is no discretion whether or not to pay. *Minister of Finance, Government of Sabah v. Petrosajasa Sdn Bhd* (refd). (para 17)
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- (4) The 3rd respondent, Pegawai Kewangan Negeri Pulau Pinang, as the officer in charge of financial matters for the State was naturally responsible for the payment of the sum stated in the certificate to the appellant. It was incumbent upon the court to give effect to such statutory duty to pay through the coercive force of an order of mandamus against the 3rd respondent. *Minister of Finance, Government of Sabah v. Petrosajasa Sdn Bhd* (refd). (para 18)
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- D ***Bahasa Malaysia Translation Of Headnotes***
- Perayu (plaintif dalam satu guaman sivil terhadap beberapa Pegawai Kerajaan Negeri) telah memperoleh penghakiman terhadap beberapa pegawai (defendan-defendan dalam guaman) Kerajaan Negeri Pulau Pinang ('Kerajaan Negeri'). Gantirugi telah ditaksir oleh Timbalan Pendaftar. Defendan-defendan merayu kepada hakim dalam kamar tetapi rayuan ditangguhkan beberapa kali atas permohonan defendan-defendan. Permohonan defendan-defendan untuk penggantungan pelaksanaan sementara menunggu rayuan telah ditolak dengan kos. Defendan-defendan telah menggunakan segala peluang merayu terhadap penghakiman berhubung isu liabiliti. Perayu telah beberapa kali menuntut supaya Kerajaan Negeri membuat pembayaran atas jumlah penghakiman, namun tidak berjaya. Perayu kemudian memperoleh sijil di bawah s. 33 Akta Prosiding Kerajaan 1956 ('APK') mengarahkan defendan-defendan membayar separuh dari gantirugi yang ditaksir beserta dengan faedah sementara menunggu rayuan mereka kepada hakim dalam kamar. Salinan-salinan sijil tersebut telah diserahkan kepada Penasihat Undang-Undang Negeri serta kepada responden-responden di sini. Responden-responden enggan dan/atau gagal mengenenpikan sijil. Berikutnya, perayu memohon kepada Mahkamah Tinggi untuk perintah mandamus bagi mengarahkan responden-responden supaya mematuhi sijil. Hakim menolak permohonan dan sebaliknya memerintahkan responden-responden supaya membuat pembayaran jumlah berkenaan ke mahkamah sementara menunggu rayuan mereka kepada hakim dalam kamar
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berkaitan gantirugi yang ditaksir. Antara lain hakim memutuskan bahawa sijil di bawah s. 33 telah dikeluarkan secara pramatang. Perayu telah merayu ke Mahkamah Rayuan. A

Diputuskan (membenarkan rayuan)

Oleh KN Segara HMR:

- (1) Hakim bicara gagal mengambilkira bahawa tidak ada penggantungan pelaksanaan yang sah terhadap taksiran gantirugi dan bahawa sijil s. 33 juga tidak pernah diketepikan. Adalah tidak terbuka bagi hakim bicara untuk merumuskan bahawa sijil telah diperolehi secara pramatang dan bahawa ianya harus dipohon hanya selepas rayuan terhadap taksiran gantirugi telah diputuskan. Yang arif hakim telah tersalah arah akan dirinya di sisi undang-undang dan fakta bahawa sijil s. 33 telah dikeluarkan secara pramatang. B C D
- (2) Bahasa yang digunakan oleh s. 33 APK adalah jelas dan tidak kabur. Suatu sijil di bawah s. 33 boleh dikeluarkan walaupun rayuan masih belum didengar tertakluk kepada budibicara mahkamah untuk memerintahkan supaya pembayaran keseluruhan atau sebahagian dari jumlah penghakiman tersebut digantung dahulu sementara menunggu rayuan. Dalam kes semasa, Timbalan Pendaftar telah melaksanakan budibicara tersebut dengan menggantung pembayaran separuh dari jumlah penghakiman sementara menunggu rayuan kepada Hakim dalam Kamar. E F
- (3) Seksyen 33(2) dan (3) APK memperuntukkan bahawa sebaik diserahkan dengan sijil, Kerajaan harus membayar kepada orang yang berhak atau kepada peguamcaranya jumlah yang kena dibayar seperti yang tercatat pada sijil beserta dengan faedah-faedahnya yang sah. Tanggungjawab statutori ini hanya tertakluk kepada proviso di bawah s. 33(3) yang memberi kuasa kepada mahkamah yang mengeluarkan sijil untuk menggantung keseluruhan atau pun sebahagian dari pembayaran sementara menunggu rayuan. Tidak ada peruntukan yang mengecualikan Kerajaan dari membuat pembayaran kepada orang yang berhak jika terdapat rayuan atau membenarkannya membayar ke mahkamah. Di bawah s. 33(4) GPA Kerajaan kelihatannya dikecualikan dari prosedur pelaksanaan biasa, namun, di sebalik itu, di bawah s. 33(3), Kerajaan berada di bahawa tanggungjawab statutori untuk G H I

- A membayar jumlah penghakiman yang tercatat pada sijil. Tanggungjawab untuk membayar di bawah s. 33(3) jelas satu tanggungjawab statutori dan ianya mengikat Kerajaan Negeri. Tiada budibicara sama ada untuk membayar atau tidak membayar. *Minister of Finance, Government of Sabah v. Petrosajasa Sdn Bhd* (dirujuk).
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- C (4) Responden ketiga, Pegawai Kewangan Negeri Pulau Pinang, selaku pegawai yang bertanggungjawab terhadap soal kewangan Negeri, dengan sendirinya bertanggungjawab atas pembayaran jumlah yang tercatat di dalam sijil kepada perayu. Mahkamah berkewajipan memberi kesan kepada tanggungjawab statutori untuk membayar sedemikian melalui kuasa memaksa mandamus terhadap responden ketiga. *Minister of Finance, Government of Sabah v. Petrosajasa Sdn Bhd* (dirujuk).
- D **Case(s) referred to:**
Minister of Finance, Government of Sabah v. Petrosajasa Sdn Bhd [2008] 5 CLJ 321 CA (*refd*)
- E **Legislation referred to:**
Government Proceedings Act 1956, s. 33(2), (3), (4)
For the appellant - Wong Yee Chue; M/s Lim Kean Siew & Co
For the respondent - Mohd Ghazali Mohamad Taib, State Legal Advisor
[Appeal from High Court, Pulau Pinang; Application For Judicial Review No: 25-103-2008 (MT-3)]
- F *Reported by Andrew Christopher Simon*

JUDGMENT

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- H **KN Segara JCA:**
- I [1] The appeal before us is against the learned High Court Judge's decision in dismissing on 19 February 2009 the appellant's application for an order of mandamus to coerce the respondents to carry out their statutory duty under s. 33(3) of the Government Proceedings Act 1956 (GPA) to honour payment of half of a judgment sum with interest as required by the certificate issued by the court on 12 August 2008. The learned judge instead directed the respondents to deposit the said judgment sum into court (pending the disposal of an appeal by the respondents

against the quantum of damages assessed by the Deputy Registrar, pursuant to the judgment of the High Court Judge on 4 October 2005).

[2] The appellant is merely seeking the assistance of the court to get the State Government to satisfy the judgment sum obtained against its officers. The procedure to be followed is set out in s. 33 GPA which reads as follows:

33(1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person on whose favour the order is made upon the person for the time being named in the record as the advocate for the Government or for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that **the court by which any such order as aforesaid is made** or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, **payment of the whole of any amount so payable**, or any part thereof, **shall be suspended**, and if the certificate has not been issued may order any such directions to be inserted therein.

- A (4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs. (emphasis
- B provided)
- C [3] We are of the view that there is only one primary issue before us, namely: Has the judge misdirected himself in law in refusing an order of mandamus when directing the respondents to deposit into court the judgment sum in the face of an unchallenged certificate under s. 33 GPA issued to the appellant and the absence of a stay of execution of the damages assessed by the Deputy Registrar?
- D [4] Briefly, the background facts leading up to the issue of the certificate under s. 33 GPA and the application for judicial review for an order of mandamus is as follows.
- E [5] On 24 January 2005 the Penang State Government wrongfully and arbitrarily cancelled the appellant's title to a piece of quarry land. Thereupon the appellant filed Originating Summons No 24-151-2005 on 1 February 2005 against:
- F (1) Pengarah Tanah Galian Pulau Pinang,
- (2) Pendaftar Hakmilik Tanah Pulau Pinang and
- (3) Pentadbir Tanah Daerah Seberang Perai Tengah.
- G [6] The plaintiff (appellant) obtained judgment against the said defendants (respondents) on 4 October 2005 and the learned judge directed the damages to be assessed by the Deputy Registrar. All appeal avenues against the said judgment on liability have been exhausted and the said judgment stands undisputed. The learned judge in his written grounds of judgment stated "This court ... found for the plaintiff and held that he was entitled to damages for *inter alia* loss of profit and loss of goodwill. It accordingly awarded the plaintiff such damages to be assessed."
- H [7] On 21 September 2007, the Deputy Registrar assessed the damages at RM29,356,271 with interest thereon at the rate of 8% per annum from 24 January 2005 until full realization. The
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defendants appealed to judge-in-chambers on 25 September 2007 but has been adjourned several times upon the defendants' request. The defendants' application for stay of execution pending the appeal was dismissed with costs on 5/10/2007 by the Deputy Registrar.

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[8] It is not disputed that although the State Government was not cited as a party by the plaintiff in Originating Summons No. 24-151-2005, nevertheless the three defendants cited are officers of the Government and were executing their official duties at all material times. In the upshot, the Government would be liable to pay the quantum of damages assessed.

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[9] The appellant, between 21 September 2007 and 2 July 2008 made repeated requests to the State Government, through his solicitors, for payment and/or amicable settlement but was totally ignored (see letters pp. 118-127 record of appeal vol. 2). Consequently, upon the appellant's application on 12 August 2008 the High Court issued a certificate (Sijil Untuk Perintah Bayaran Gantirugi Terhadap Kerajaan) pursuant to s. 33 of the GPA stating the amount of the judgment sum owing whilst suspending payment of half of the judgment sum pending the disposal of the defendants' appeal to judge-in-chambers against the quantum on the assessment of damages. The relevant parts of the certificate read:

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MENURUT PERINTAH MAHKAMAH INI bertarikh 4/10/2005 ... DAN MENURUT PENGHAKIMAN SELEPAS TAKSIRAN GANTIRUGI MAHKAMAH INI bertarikh 21/9/2007 telah dihakimi dan diperintahkan bahawa Defendan-defendan hendaklah secara berse sama dan berasingan membayar kepada Plaintiff gantirugi sejumlah RM29,356,271.00 dengan faedah di atasnya pada kadar 8% setahun dikira dari 24/1/2005 sehingga penyelesaian penuh dan kos-kos untuk taksiran gantirugi, yang akan ditetapkan.

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Saya dengan ini mengesahkan bahawa gantirugi yang kena dibayar oleh Defendan-defendan kepada Plaintiff berikutan daripada Perintah dan Penghakiman tersebut adalah sejumlah RM29,356,271-00 dengan faedah di atas jumlah gantirugi tersebut pada kadar 8% setahun dikira dari 24/1/2005 sehingga pembayaran penuh.

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Saya dengan ini juga mengarahkan menurut proviso kepada seksyen 33(3) Akta Prosiding Kerajaan 1956 bahawa pembayaran separuh daripada jumlah gantirugi tersebut digantungkan sehingga

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Sijil ini tidak merangkumi jumlah yang kena dibayar di bawah Perintah Penghakiman tersebut berkenaan dengan kos-kos.

B [10] Therefore the amount payable in accordance with the certificate was RM14,678,135.50 with interest at 8% per annum calculated from 24 January 2005. The certificate was duly served on the State Legal Adviser on 18 August 2008 together with a request for payment *vide* solicitors' letter dated 15 August 2008.

C Copies of the certificate and the solicitors' letter were also served on (1) Ketua Menteri Pulau Pinang, (2) Setiausaha Kerajaan Negeri, Pulau Pinang and (3) Pegawai Kewangan Negeri Pulau Pinang (the respondents herein). The respondents took no steps to set aside the certificate.

D [11] The respondents totally failed to honour payment in accordance with the certificate despite the appellant's warning that an application for mandamus would be made as stated in the solicitors' letter dated 8 September 2008 as follows:

6. Sila ambil perhatian bahawa jika pihak Kerajaan Negeri Pulau Pinang gagal membuat bayaran dalam tempoh 10 hari dari tarikh surat ini, iaitu sebelum atau pada 18/9/2008, pelanggan kami tiada pilihan melainkan membuat permohonan kepada mahkamah untuk suatu Perintah Mandamus bagi memaksa pematuhan kewajipan statutory tersebut tanpa sebarang notis yang selanjutnya ...

[12] The appellant obtained leave to apply for judicial review for an order of mandamus on 26 September 2008. The notice of hearing of the application for judicial review was finally heard on 2 December 2008 and on 19 February 2009 the learned judge dismissed the appellant's application for an order of mandamus to compel the respondents to comply with the certificate. He instead ordered the sum of RM14,678,135.50 to be paid by the respondents into court within two months pending the disposal of the appeal to judge-in-chambers on the quantum of damages.

[13] The learned judge dismissed the appellant's application for mandamus primarily on two grounds:

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- (2) that the s. 33 GPA certificate was premature since the appeal to the judge-in-chambers against the Deputy Registrar's award of damages is still pending. A

[14] The learned judge stated, *inter alia*, in his grounds of judgment as follows: B

Namun, jika diteliti kepada kesan dari pengeluaran sesuatu perintah Mandamus itu, serta jika diteliti kepada peruntukan statut juga, dapat dilihat bahawa adalah menjadi *niat Parlimen* bahawa perintah Mandamus hanyalah terpakai dan wajar diaplikasikan di dalam keadaan di mana sesuatu perkara itu telah menjadi suatu 'finality', 'Finality' di sini bermaksud segala 'avenue' Perundangan untuk setiap tahap prosiding kes telah dilalui dan di 'exhaust' dengan sepenuhnya. Di dalam kes sebegini, *maksud segala tahap Rayuan baik di peringkat mana sekalipun, Rayuan telah didengar dan diputuskan dengan sepenuhnya. Adalah tidak menepati hasrat penggubal undang-undang (legislatures) untuk sesuatu perintah Mandamus itu dikeluarkan di peringkat atau di tahap sesuatu kes itu masih belum dimuktamadkan lagi* kerana dari segi 'rationale', keputusan yang dicapai itu di tahap yang masih membolehkannya dirayu, masih belum dikatakan sebagai sesuatu yang muktamad lagi ... *Pengeluaran Sijil bertarikh 21 September 2007 itu adalah sesuatu yang berbentuk Pra-matang ... Sewajarnya Sijil dibawah Seksyen 33(3) Akta dipohon setelah Rayuan tersebut dilupuskan.* (emphasis added) C D E

[15] In so doing the learned trial judge has misdirected himself on the primary factual matrix for focus in the determination of the application for mandamus that was before him. He has failed, in particular, to appreciate that in law: (1) there is no valid stay of execution on the assessment of damages and (2) that the s. 33(3) GPA certificate has never been set aside. In the circumstances, it is not open to the learned judge to rule that the certificate was obtained prematurely and that it ought to be applied for only after the appeal against assessment of damages has been finally disposed off. The learned judge has misdirected himself in law and in fact that the s. 33 GPA certificate has been issued prematurely. We are unanimous that on this ground alone the appeal should be allowed. F G H

[16] Section 33 GPA uses clear and unambiguous language. It is beyond dispute that a certificate under s. 33 GPA can be issued even when an appeal is still pending subject to the discretion of the court to direct that the payment of the whole or part of the I

- A judgment sum be suspended pending the appeal (see s. 33(3) proviso, *supra*). In this case the Deputy Registrar has exercised that discretion by suspending payment of half of the judgment sum pending the appeal to the judge-in-chambers.
- B [17] Section 33(2) and (3) GPA provides that upon service of the certificate the Government shall pay to the person entitled or to his solicitors the amount appearing by the certificate to be due to him together with the interest lawfully due. This statutory duty is subject only to the proviso under s. 33(3) which empowers the court issuing the certificate to suspend the whole or part of payment pending the appeal. There is no provision exempting the Government from payment to the person entitled when there is an appeal or providing for payment into court instead. It would appear that under s. 33(4) GPA the Government is excluded from the ordinary enforcement procedure but on the other hand by s. 33(3) GPA the Government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s. 33(3) is clearly a statutory duty which is binding on the State Government. There is no discretion whether or not to pay (see *Minister of Finance, Government of Sabah v. Petrosajasa Sdn Bhd* [2008] 5 CLJ 321).
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- F [18] The 3rd respondent, Pegawai Kewangan Negeri Pulau Pinang, as the officer in charge of financial matters for the State is naturally responsible for the payment of the sum stated in the certificate to the appellant. It is incumbent upon the court to give effect to such statutory duty to pay through the coercive force of an order of mandamus against the 3rd respondent (see also *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd, supra*).
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- H [19] In the upshot, we are unanimous that the appeal is allowed with costs here and below. The order of the High Court dated 19 February 2009 is set aside. Money paid into court, if any, pursuant to the order of the High Court, shall be paid out to the appellant towards account of money due under the s. 33(3) GPA certificate. There shall be an order of mandamus against the 3rd respondent.

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